In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 76-3

KERRY M. GOUGH, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,

Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET AND DRAPERY CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Kerry M. Gough petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 17, 1976, petition for rehearing denied on June 4, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached hereto

as Appendix A. It will be referred to herein as *Gough II*. The first opinion of the court of appeals is reported at 487 F.2d 373 (1973). It is attached hereto as Appendix B. It will be referred to herein as *Gough I*. The opinion of the trial court which was reviewed in the second appeal is attached hereto as Appendix C.

JURISDICTION

The opinion of the court of appeals was entered on March 17, 1976 (Appendix A). A petition for rehearing was denied on June 4, 1976 (Appendix E). An order denying a motion to stay mandate was entered on June 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. (a) Does *Neely v. Martin K. Eby Construction Co.* and the purpose of Rule 50 to speed litigation and avoid unnecessary trials place the responsibility of deciding issues of law, especially the substantiality of the evidence to support a verdict, upon the appellate courts in Rule 50(d) proceedings?

(b) May a motion for judgment *n.o.v.* be raised for the first time in a petition for rehearing without a showing of compliance with Rule 50(b)?

2. Does a remand for further proceedings following a dispositive opinion of the appellate court, without direction to hold a hearing as to the merits of any motion,

grant the trial court complete discretion to enter a judgment without specifically ruling on all arguments which were addressed to the appellate court in a petition for rehearing?

3. (a) Must a party against whom a judgment has been entered, following a complete review of the trial record by a first appellate court, show a second appellate court that the trial court abused its discretion in determining from his knowledge of the record and the proceedings that the plaintiff, who had established all factual issues except as to jurisdiction in his court, had a right to judgment?

(b) Is this not especially so when the judgment loser on remand has filed motions for judgment *n.o.v.* and new trial which were denied?

4. Are not the following issues urged as allowing a judgment *n.o.v.* sham or frivolous?:

A. Horizontal agreements among competitors alone are actionable conspiracies under the antitrust laws.

B. A successful conspiracy to prevent a competitor to one of the conspirators from advertising in a newspaper is not *per se* illegal.

C. A relevant market must be defined in a §1 Sherman Act case.

D. A retailer who had made sales of $17,000 in 3 months of selling to a market from which he is subsequently excluded and whose profits on these sales were approximately $6,000 is not entitled to a verdict as to lost profits of $18,000 for an approximately 2½ year period.

E. Upon the findings that a conspiracy was a substantial factor in closing a furniture store, at a loss, a retailer is not entitled to a loss of good will award of $22,738 where his books and records showed a $20,000 net profit in the year the market was open and then closed and his average net worth was $38,387.

5. Does not the acceptance of the benefits of a policy in restraint of trade by a retailer with knowledge of the restraint establish as a matter of law an actionable combination in restraint of trade?

6. May a second appellate court remand with directions to hold arguments on the merits of matters advanced in a petition for rehearing following a prior appellate court's declination to require that very mandate?

STATUTES INVOLVED

The statutes involved are §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2; §4 of the Clayton Act, 15 U.S.C. §15. These are printed and attached hereto as Appendix D.

STATEMENT OF THE CASE

A. THE TRIAL

1. The Parties.

The action involves the effectuation of an agreement to eliminate competition in the sale of carpets and drapes at a retirement community located in Walnut Creek, California, financed by federal mortgage commitments pursuant to Sec. 312 of the National Housing Act. 12 U.S.C. Sec. 1715(e).

The builder of the retirement community is Rossmoor Corporation. It is owned by Mr. Ross Cortese and his daughter (Tr. 937, 221-223, 923-926). Mr. Cortese determined also to go into the business of selling carpets and drapes to purchasers of the apartment houses, called manors (Tr. 945-946). He organized a corporation, Crestmark Carpet and Drapery, to enter into that business at the Rossmoor Leisure World communities (Tr. 55-56, 945-973). Rossmoor Corporation did not sell the manors to the public (Tr. 44-45). This was done by a separate corporation, Leisure World Foundation (successor to National Golden Rain Foundation) (Tr. 473-492). It would organize Mutual Corporations in which the purchaser would buy stock (Tr. 367-368, 471-477). The stock allowed occupancy of a manor and use of the community grounds (Id.). Officers or employees of Leisure World Foundation were placed upon the Board of Directors of the Mutual Corporations. This resulted in employees of Leisure World Foundation entering into construction contracts with Rossmoor after 90% of the shares had been reissued (Tr. 48-50, 491-498; Pl. Exs. 11, 122, 183). Leisure World also became the agent of the Mutuals in administering and running the community (Pl. Exs. 29-33.2). The community facilities were held in trust by another corporation, Golden Rain Foundation of Walnut Creek who also entered into management agreements with Leisure World Foundation (Tr. 367-368, 471-477, Pl. Ex. 29). The Leisure World Foundation operates a newspaper, the Leisure World News (Pl. Ex. 124, Tr. 237-240).

Rossmoor Corporation leased to Leisure World Foundation the Administration Building at Walnut Creek (Pl.

Ex. 8-1, Tr. 228-231), then Leisure World subleased 6000 square feet to Rossmoor Furniture Company, who assigned the lease to Crestmark (Pl. Ex. 9, Tr. 231-232, Pl. Ex. 14, Tr. 97). Rossmoor Furniture Company was a wholly owned subsidiary of Rossmoor (Tr. 932-933) and the predecessor of Classic Interior Decorating Co. (Id.).

On January 1, 1965, Rossmoor Furniture Co. had entered into an agreement with Chandlers-Laguna Hills whereby the sale of carpets and draperies at Walnut Creek was separated from the sale of furniture; Chandlers not to engage in the sale of carpets and drapes at the Administration Building furniture store, that being reserved to Crestmark (Pl. Ex. 13, Tr. 71-79).

Plaintiff, at the trial, was Louis Rosen doing business as Walnut Creek Furniture. He was in competition with the Crestmark Carpet and Drapery concession at the Administration building of Rossmoor Leisure World, Walnut Creek (Tr. 586-587). Plaintiff's store was located in downtown Walnut Creek, one mile from the Rossmoor development (Tr. 587).

2. The Evidence of Agreement in Restraint of Trade.

The first moves of residents into the community occurred about October 30, 1964 (Tr. 458). Mr. Rosen was unsuccessful in his attempt to find a way to reach prospective customers for advertising his furniture store (Tr. 586-590).

Leisure World and Crestmark entered into an agreement under which the purchasers of the manors would be required to select colors for their manors from the Crestmark salesman who was appointed by Leisure World as

the color consultant (Tr. 880-881, Pl. Ex. 42, 126-129; Pl. Ex. 36, Tr. 63-64). At the time of the color selection, the purchaser of the manor is to be sold carpets and drapes by the salesman (Tr. 128-29, Tr. 877-884). In order to insure these referrals, spiff payments were made by Leisure World to Crestmark salesmen (Pl. Ex. 39-1, 39-2). Drawings were also to be held by Crestmark at the beginning of each month so that Leisure World personnel who were instrumental in making the carpet and drapery sales would receive a prize (Tr. 149-150, Id.). Another device used was that Crestmark salesman would inform the buyer that carpet installation would be allowed prior to move in only if the carpets were purchased from Crestmark (Tr. 153-158, 883-884). The Leisure World Foundation had listening devices in the sales personnel offices to monitor their conversations (Tr. 535-537).

The Leisure World News was first published April, 1965 (Tr. 238). Each Leisure World Community had a newspaper (Pl. Ex. 124, Tr. 237-240). Its Executive Editor was Vera Moorman (Tr. 240, 978-981). The President of Rossmoor Corporation and owner, Mr. Ross Cortese, testified at Tr. 978-979:

"Q. Do you know a Vera Moorman?
A. Yes.
Q. What is her position or capacity?
A. She worked for the Foundation as part of the newspaper.
Q. She was an executive editor, was she not?
A. I don't know what they called her.
Q. Well, haven't you had conversations from time to time with Miss Moorman concerning business affairs, Mr. Cortese?

A. Not the Leisure World, no.

Q. You have discussed business with Mrs. Moorman, have you not?

A. She is a private consultant for us on the outside for newspaper articles.

Q. She also draws a salary from Leisure World Foundation, is that right?

A. Yes.

Q. So she is a consultant for Rossmoor Corporation and she is also an employee of Leisure World Foundation, is that correct?

A. Was."

Mr. E.L. Olsen, Vice President of Leisure World, wrote to its President in March, 1965 outlining a meeting between Mrs. Vera Moorman, *supra,* concerning an announcement that Crestmark had been appointed as exclusive sales agent for all Leisure World communities (Pl. Ex. 37, Tr. 980). She explained that Mr. Cortese had introduced Mr. McMullen of Crestmark to her and suggested that she write an article concerning Crestmark. Mr. McMullen then gave her information for the article. The statement had caused problems in connection with potential buyers. (Id.).

Mr. Robert Moon was a sales executive for Leisure World Foundation (Tr. 383), and for Rossmoor (Tr. 961-962).

The editor of the Leisure World News, Walnut Creek, was Mr. John L. Ferris (Tr. 237). Its advertising director was Mr. Carl Cronin (Tr. 898).

Mr. Cronin had solicited Mr. Rosen for his advertising in the Leisure World News in May, 1965. Mr. Rosen

was enthusiastic and signed a 52 week contract for 26 advertisements (Pl. Ex. 62, Tr. 589-591). Mr. Rosen then talked to representatives of the Mohawk Carpet, a manfacturer, and suggested that they plan to have five or six different fabrics which would apply to the type of people that would be expected to buy manors (Tr. 591-593). Mohawk agreed to give Mr. Rosen roll prices on all carpets, that they would supply him with labels for the names that Mr. Rosen would pick that would be used for the type of floor plans used in the construction of the mutuals. Mr. Rosen then advertised in the newspaper (Pl. Ex. 65, 66, 67, 125, 126, 127, 128). The advertisements showed prices below the Crestmark prices (Tr. 638). Such prices were shown in the editions of June 17, 1965, June 24, 1965 and July 15, 1965 (Pl. Exs. 65, 66 and 67).

At this time the newspaper staff in Walnut Creek was instructed that the paper could not allow wall to wall carpet advertising "from outside sources" in the Leisure World. Mr. Cronin testified that he learned of the policy when Mr. Nelson, the administrator of the Leisure World community at Walnut Creek was walking with Mr. Ross Cortese after the July 15, 1965 advertisement (Tr. 900-901). It was a Saturday morning. The following occurred (Tr. 901-903):

"Q. What were the circumstances under which you first learned that the newspaper company could not continue to carry wall to wall carpet advertising?

A. Saturday morning, going to the sales office to pick up the mail, Mr. Nelson was walking down the other side of the mall and I was walking on this side and he came over, stopped me, and said, 'It has been

decided that there will be no more wall to wall carpet advertising run from outside sources.'

Q. Now did you see anyone with Mr. Nelson at the time of this conversation?

A. Mr. Cortese and someone else that I don't recall who it was at this time.

Q. Did you see Mr. Cortese walking with Mr. Nelson?

A. Yes.

Q. As I understand your testimony then Mr. Nelson left Mr. Cortese and talked to you

A. Yes.

Q. And you heretofore indicated what Mr. Nelson told you, is that correct?

A. Yes.

Q. Did you say anything at this time? Before I ask you that, how far would you estimate Mr. Cortese was away from you and Mr. Nelson?

A. From here to the wall and back there by the time we were talking.

• • • • •

Q. What would you approximate that to be?

A. Oh, 40, 50 feet.

The Court: Call it 50 feet.

Mr. Keith: Q. Now could you tell us what was said and done then in this conversation between you and Mr. Nelson?

A. I told him I was very disturbed about it, that I had many accounts that I was working on that sold wall to wall carpeting and that they would all have to be advised of this decision, that I had hoped the order would be rescinded. He said we would talk about it later and that was it."

Thereafter, Mr. Ferris and Mr. Cronin held meetings with Mr. Nelson in an attempt to have the order re-

scinded (Tr. 904-908). Mr. Cronin specifically raised the consideration that the order might be in restraint of trade (Tr. 906).

Other merchants were advised by the Leisure World News, Walnut Creek that they would be unable to advertise carpets and drapes. Included in these were Capwell's, Jackson's and J. C. Penney (Tr. 907, Pl. Ex. 50-A, Tr. 294-295). Mr. Ferris, Mr. Cronin and Mr. Nelson attempted to have the national headquarters of Leisure World Foundation reverse the policy of no outside carpet advertising. Their decisions were memorialized in the contemporaneous business records written in this regard (Pl. Exs. 49, 50, 51 and 50-A). On September 20, 1965 Mr. Nelson wrote to Mr. Olsen (Pl. Ex. 49) stating in part (Tr. 446-447):

> "You are familiar with the change in policy at Walnut Creek not to run carpet ads in the Leisure World News with the exception of Crestmark Carpets as sold by Rossmoor Corporation. J. C. Penney and Capwell's both want to run carpet ads. Capwell's has been supporting us with an ad every week. J. C. Penney wanted to run a $108.00 ad each week for a full year. J. C. Penney entered their new merchandising program plans to sell carpets and drapes.
>
> • • •
>
> . . . We feel that by eliminating carpet ads, we will lose between $1,000 and $1,200 income per month."

Mr. Ferris carried out the policy of restricting carpets and drapes advertising to only Crestmark (Tr. 284). Mr. Ferris testified the policy applied to such accounts as Penney's, Capwell's, and Jackson's and that he undertook to dissuade his superiors from the policy (Tr. 289-

305). Mr. Ferris believed the policy caused a loss of revenue to the paper (Tr. 288-290). Mr. Rosen could no longer advertise carpets in the paper after July 1965, and he took steps to have the ads reinstated (Tr. 605). On August 16, 1965, Mr. Nelson informed Mr. Rosen's attorney that his letter of protest would be taken under advisement (Pl. Ex. 54, Tr. 325).

Before the 9/20/65 letter, Mr. Nelson had discussed with Mr. D. J. Krauter, Director of Administration of Leisure World Foundation (Tr. 544) the policy of cancelling ads (Tr. 436). Mr. Nelson went to Laguna Hills to discuss the matter (Tr. 438-439). The offices of Mr. Krauter and Mr. Olsen were in the Rossmoor Corporation headquarters building where Mr. Cortese's office was located (Tr. 556-558).

Then, on or about September 23, 1965, Mr. Nelson received a policy letter which limited advertising in the Leisure World News, of carpets and drapes, to Crestmark (Tr. 451-454). It provided in part (Pl. Ex. 51, Tr. 307):

> "3. The newspaper does not accept carpet and drapery advertising except the Rossmoor Leisure World company ads."

Crestmark continued to advertise in the Leisure World News (Pl. Ex. 57, 58, 104-119; advertising contract, Pl. Exs. 59 and 60).

The record further showed that Leisure World salesmen had previously sold carpets for Rossmoor's carpet company at Seal Beach and Laguna Hills (Tr. 945-951); that Mr. Cortese hired Mr. McMullen, the Manager of Crestmark, Tr. 968, Pl. Ex. 185; that the idea of selling carpets

and drapes for profit was Mr. Cortese's (Tr. 946); that Mr. Cortese would have liked to have sold all the carpets and drapes at the Leisure World communities (Tr. 985); that he kept advised of the Leisure World activities (Tr. 951); that he changed his deposition from that he never discussed carpets and drapes with Mr. Nelson to that he does not recall doing so (Tr. 977); that Mr. Cortese knew Crestmark employees were the color consultants for Leisure World Foundation (Tr. 989, he changed his deposition testimony as to this matter); that he presumes that an attempt was made by Crestmark to sell carpets and drapes when it assists the customer in color selection (Tr. 990); that he has guaranteed Leisure World's loans from United California Bank to the extent of $1,000,000 (Tr. 1052).

As to Mr. Cronin's testimony that Mr. Cortese was with Mr. Nelson when he first learned of the policy, Mr. Cortese testified that it was possible he was in Walnut Creek in the summer of 1965 (Tr. 1095-1096); that it was possible he saw Mr. Nelson at this time and that Mr. Nelson might have said something about carpeting, but that he did not recall (Tr. 1096-1101).

The initial estimates for Rossmoor Leisure World, Walnut Creek was for a community of 10,000 persons (Tr. 498). Mr. Rosen testified that a retailer could expect about a $2,000.00 carpet and drapery order on a move in (Tr. 645). The policy involved affected therefore $20,000,000 of sales of carpets and drapes.

There further is no dispute that in July, 1965 the Leisure World personnel in charge of sending out mailers

to prospective purchasers found that the edition of the Leisure World News containing Mr. Rosen's price advertising had been scooped up and were unavailable for mailing (Tr. 534-535).

3. Other Statements Made During the Course of the Conspiracy.

Mr. Ferris was informed at the time of his learning of the policy against allowing other than Crestmark Carpet company ads, that (Tr. 518):

> "Mr. Nelson told me that we would have to take the Walnut Creek Furniture advertisement out of the paper, and he told me that Mr. Cortese had told him that it should be taken out of the paper, and he quoted Mr. Cortese roughly as saying, 'tell that guy that runs the paper to get that ad out.'"

Mr. Krauter, supra, identified the problem of outsider advertising raised by Mr. Nelson at a staff meeting on August 5, 1965 as (Pl. Ex. 38) "problems concerning the acceptance of advertising in our Leisure World Newspaper which advertisements are directly competitive with our own sales interest and allied interests such as carpeting and draperies."

When Mr. Rosen was informed of his inability to advertise in the newspaper by Mr. Cronin, he was told, Tr. 603:

> "Well, Mr. Rosen, in all the 35 years that I have been in the newspaper business, I have never seen anything like this."

4. Injury and Damages.

The economic data presented by plaintiff and defendant included the sales, profits and losses of the plaintiff from

1963 to September 1967 (Df. Ex. E), the net worth of the plaintiff from 1962 to 1966 (Pl. Ex. 95), plaintiff's sales of carpets, draperies and furniture to residents of Rossmoor from 1965 to September 1967, on a month to month basis (Pl. Ex. 88A), Crestmark sales of carpets and draperies to residents of Rossmoor for the same period of time (Pl. Ex. 92), the testimony that the sales to Rossmoor in 1965 did not increase expenses or costs of Walnut Creek Furniture (Tr. 807-809), plaintiff's estimate of losses based on inability to advertise in the Rossmoor Leisure World News (Tr. 645-660).

For the third quarter of 1965 Mr. Rosen showed sales to Rossmoor of $17,000 and profits of $6,000 (Pl. Ex. 88A). The third quarter of the following year the sales to residents of Rossmoor, $3,556 in sales and $1,235 in profits (Id.). Mr. Rosen testified to the extensive volume of business generated by the advertisements (Tr. 633-639), and his belief that business was going to be very profitable (Tr. 646-662). In September 1967 Mr. Rosen was forced to close his doors because of lack of business (Tr. 617). No good will was received and in fact he showed a loss on closing in 1967 of $962.97 (Tr. 837).

5. Defenses.

The basic defense of respondents was to contest the conspiracy issue and interstate commerce (Tr. 41, 1254). They urged a single traders' right of selection of advertisers (Cr. 153). They also raised a confession and avoidance contending that Leisure World Foundation desired to prevent injury to manors which occurred when unaffiliated carpetlayers were involved (Df. Ex. B, Tr. 41, 504-506). But Mr. Robert Nelson testified that this was not men-

tioned as grounds for the restrictions on advertising (Id.). He admitted it was used only as an excuse (Tr. 509, 512-514). In fact, Crestmark contracted for the laying of carpets with outside installation companies (Pl. Ex. 195, 12, 15).

6. Interstate Commerce.

The matter of interstate commerce is set forth in footnote 1 in *Gough I*, Appendix B herein.

7. The Jury Answer to Interrogatories and Judgment.

Respondents proposed interrogatories for the jury to answer pursuant to F.R. Civ. P. 49(a) (Tr. 1323). The jury then returned the answers to the interrogatories as shown in *Gough I*, footnote 2. The trial court, the Honorable Elbert Parr Tuttle, then entered judgment for respondent on the failure of plaintiff to have proved jurisdiction (Cr. 285-287). Petitioner's motions for judgment *n.o.v.* or for a new trial were denied (Id.).

No motion for judgment *n.o.v.* was filed by respondents.

8. The Appeal by Petitioner in Gough I.

The Court of Appeals reversed the judgment for respondent here (Appendix B herein). It initially ordered that judgment be entered for plaintiff. Thereafter, respondents filed Appellees' Petition for Rehearing including Motion for Judgment Notwithstanding The Verdict, Motion for New Trial and Suggestion for Appropriateness of Rehearing *en banc* (Cr. 356-411).

The Petition for Rehearing was divided into four parts, Part I: Petition for Rehearing Addressed to the Panel

(Cr. 356-379); Part II: Petition for Rehearing by the Court Sitting *en banc;* Part III: Motion for Judgment Notwithstanding The Verdict (Cr. 391-405); Part IV: Motion for a New Trial (Cr. 406-411). Part I was divided into two sections. Part A claimed that the grounds for the decision were either waived by Rosen or were contrary to the law of the case. Part B claimed that entry of judgment in favor of the plaintiff was not a permissible disposition of the appeal. In this section respondents urged that they could not have conspired because they are affiliated and not in competition with each other (Cr. 372-373); that the objective of the conspiracy would not be in restraint of trade because it was not shown that the agreement had been entered into with an intent to create a monopoly or reduce the level of competition in the market or that it was a *per se* offense (Cr. 373-374). No *per se* offense was seen here because respondents had submitted the defense that they were protecting the manors from carpet installers at the newly constructed houses (Cr. 375-376). An attack was made because of the failure of the jury to resolve these issues notwithstanding the fact that the respondents composed these very interrogatories and submitted them to the court as dispositive (Tr. 1208). Respondents also urged in Part I, B., that the jury's answer to the interrogatory as to commerce affected the jury's consideration of other issues (Cr. 377-378).

The legal arguments were again reurged as grounds for a judgment *n.o.v.* although couched in terms of substantiality of the evidence. (Cr. 391-411). In addition respondent attacked the evidence as to damages (Cr. 398-405).

As to the motion for a new trial, defendants asserted: erroneous application of the co-conspirator exception to the Hearsay Rule (Cr. 406-409); erroneous admission of certain evidence (Cr. 410); erroneous interpretation of a stipulation as to genuineness and authenticity of documents and insufficient proof of damages. (Cr. 409-410).

In each case the respondents urged that judgment should be entered for them or that a new trial be granted, or that the trial court should be directed to make new findings or for rulings on the motions (Cr. 377, 379, 398, 411).

The Court of Appeals thereafter entered its order denying the petition for rehearing, denying the suggestion for a rehearing *en banc*, and stated; Cr. 289:

> "The last two sentences of the opinion filed October 17, 1973, are stricken and the following sentence added as a separate paragraph:
>
> > 'The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.'
>
> "The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc.
>
> "The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).
>
> "The petition for rehearing is denied and the suggestion for rehearing in banc is rejected."

The appellate court stated that the jury's answers to the special interrogatories allowed it to view respondents

as conspirators who had entered into a conspiracy to exclude plaintiff from the business of selling at retail in a local market products produced in other states, and that they had restrained plaintiff's retail business to his damage (Appendix B) The court also stated that the respondents, by restricting plaintiffs participation in retail transactions (at Rossmoor Leisure World), and by eventually excluding plaintiff entirely from this trade, diverted interstate shipments of carpeting from plaintiffs to themselves, thus interfering with the natural flow of interstate commerce. (Appendix B).

9. Proceedings on Remand.

Petitioner on remand moved to enter judgment on the opinion and mandate (Cr. 297-312). Defendants opposed the entry of judgment for plaintiff and filed Memorandum in Opposition to Motion to Enter Judgment (Cr. 342-414). The respondents represented to the trial court that they had raised in the court of appeals all of the grounds they would now urge for judgment *n.o.v.* or for a new trial (Cr. 348). Oral arguments were waived (Cr. 596-599).

The trial court thereafter ruled that the jury's findings were sufficient under law to enter judgment for plaintiff; that the respondents had urged upon the appellate court motions to enter judgment *n.o.v.* or for a new trial; that since the appellate court under *Neely* may make final disposition of such motions; the ruling of the court of appeals denying the petition for rehearing; declining to grant any motions of respondents, and failing to order the hearing of any motions of respondents, disposed of any attempt to urge upon the trial court the very same

matters already submitted to the appellate court and acted upon in its mandate (Appendix C herein). Thereafter, respondents filed motions for a judgment *n.o.v.* or for a new trial (Cr. 517-548). They were denied (Cr. 559).

10. The Appeal by Respondents.

Defendants below then appealed. Their brief contained no showing of any error in law or fact; only that the trial court had incorrectly interpreted the mandate; that the mandate, required a hearing of all the motions which they had addressed to the court of appeals (Opening Brief of Appellants, *Kerry M. Gough v. Rossmoor Corporation, et al.,* Nos. 75-1138, 75-1139).

The matter was then heard by a different panel. It concluded that the remand order of the court of appeals was an express direction to hear all the arguments advanced by the respondents, especially the arguments for a judgment *n.o.v.* It concluded that the dispositive language of the first opinion was based merely upon an assumption of the sufficiency of the evidence; that the evidence may not have been sufficient, and that the trial court erred in adjudging that the prior opinion and mandate did not allow re-argument of the motions addressed to the appellate panel, including the judgment *n.o.v.* (Appendix A herein).

REASONS FOR GRANTING THE WRIT

I

THE RIGHT TO A JUST TERMINATION OF LITIGATION AND THE AVOIDANCE OF UNNECESSARY RETRIALS REQUIRE A DETERMINATION OF THE RESPONSIBILITY OF THE APPELLATE COURTS AND THE POWER OF THE TRIAL COURT WHEN A JUDGMENT IS REVERSED ON APPEAL AND A LOSING APPELLEE FOR THE FIRST TIME RAISES A RIGHT TO A JUDGMENT N.O.V. OR A NEW TRIAL IN A PETITION FOR REHEARING.

A. Courts of Appeal Under Neely Are Not Deemed to Have Passed Back to the Trial Court the Issue of Substantiality of the Evidence to Support a Verdict After Review of the Complete Trial Record Where They Deny a Petition for Rehearing Without a Command for a Hearing on the Merits.

1. A Motion for Judgment n.o.v. Based on Substantiality of the Evidence Is Not Available After an Opinion of an Appellate Court Sustains a Cause of Action and an Appellee Has Not Complied With Rule 50(b).

This litigation, now in its eleventh year, should be terminated by this Court if the antitrust laws are to be a meaningful way of justifying wrongs done to private parties. This record discloses that all issues of fact and colorable claims as to law have been disposed of. Respondents here who had relied solely on the issue of interstate commerce to justify non-liability in their Briefs on the first appeal made a complete turnaround when they learned of their error and argued inconsistently with their arguments during the trial that, assuming a conspiracy was shown, it was not an actionable restraint of trade (Tr. 1005). It is clear that respondents are not entitled to a seriatim examination of their contentions made for the first time in a petition for rehearing on appeal in the light of the course of this litigation. First, *Neely v. Martin K. Eby Construction Co.,* 386 U.S. 317

(1967) authorizes an appellate court to decide all matters of law since the Federal Rules of Civil Procedure require speedy resolution of the litigation. (Fed. R. Civ. P. 1, 50, 61.) While an appellate court may remand for the consideration of the merits of matters of law, *Neely* directs that it be done as to only those matters which would raise the trial court's first hand knowledge of the witnesses and feel for the overall case. The judgment *n.o.v.* matters raised by respondents, especially the substantiality of the evidence, did not reach those kinds of issues. See also *United States v. Generes*, 405 U.S. 93 (1972). Thus *Neely* fully supports the trial court judgment in this case, as follows:

1) The losers on appeal sought a judgment *n.o.v.* but they did not comply with Rule 50(b), which requires a motion for a judgment *n.o.v.*, within 10 days after the judgment.

2) *Gough I* denied the respondents' petition for rehearing which contained all claimed errors of law. That denial was to be viewed in this light of *Neely's* express direction that the appellate courts are to advance the speedy termination of litigation.

3) The essential concern of the second appellate court here rests upon a belief that no court has ruled on the sufficiency of the evidence to go to a jury. But this issue of law, which the appellate court should determine, was disposed of in *Gough I* not only in its denial of the petition for rehearing but by its opinion which sustained petitioner's cause of action.

4) The contentions of respondents as to claimed errors of law have no color of validity.

Neely states that the loser on appeal should satisfy the requirements of Rule 50(b) before he can urge a judgment *n.o.v.* The court stated, 386 U.S. at 325-326:

> "The opinions in the above cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved."

Even as to new trial motions, *Neely* distinguishes between issues which the trial court has no particular competence or special advantage to decide from those issues which a trial court may be deemed to be in a better position to determine, i.e., matters involving demeanor of the witnesses or calls for a feel of the case (386 U.S. 324, 326, 327). Since the contentions of law raised in the petition for rehearing, were denied here without directing a hearing and the opinion discusses the evidence as though proved, *Neely* precludes a second appellate court from remanding for consideration matters of law necessarily resolved by the first opinion. When this Court determined a hearing should be held in the trial court it specifically indicated this in its mandate, *Iacurci v. Lummis Co.*, 387 U.S. 86 (1967).

It is respectfully submitted that two courts familiar with the trial record and the contentions of the parties have determined, as they must, that there is no genuine issue as to the substantiality of the evidence in this case. This Court, it is respectfully submitted, should inform the appellate courts of their responsibilities when a petition for rehearing raises for the first time a losing appellee's judgment *n.o.v.* contentions. *Neely* was a new trial case.

The learned court below viewed the denial of the petition for rehearing as a ruling raising motions for a new trial and a judgment *n.o.v.* In so doing it was clearly in error. The appellate court should not pass back to the trial court matters it alone must finally decide. There is no room herein for the contention that some court must hear the merits of respondents' contentions. See *Mays v. Pioneer Lumber Co.*, 502 F.2d 106 (4th Cir. 1974).

Respondents refused to seek a judgment *n.o.v.* under Rule 50(b) from the trial court before the appeal. They did not seek in their Brief On Appeal to raise the insubstantiality of the evidence in order to sustain the judgment below, but only sought to do so after learning of the reversal of this judgment. Their present position is shown to be a complete turnaround from the trial position in important respects. *Neely*, it is respectfully submitted, does not contemplate a second appellate court's concern for a loser on appeal in the light of these considerations.

II

A SUBSEQUENT COURT OF APPEALS MAY NOT CONTRADICT AND RENDER NUGATORY A DECISION OF A PRIOR COURT OF APPEALS.

A. By Express and Clear Implication There Was No Issue as to Substantiality of Evidence in the Remand by Gough I to the Trial Court.

1. Gough I Specifically Ruled on the Actionability of Petitioner's Cause of Action, Denied the Legal Matters Urged in a Petition for Rehearing and Were Presented With Frivolous Legal Contentions.

The heart of the matter at hand is simple. *Gough I* did not order a consideration of the merits as to one of respondents' motions. On a second appeal, the appellate court required such a consideration. But a mandate is completely controlling as to all matters within its compass. On remand the trial court is free to pass on any issue which was not expressly or impliedly disposed of on appeal. Whatever was before the appellate court and disposed of by the decree is considered as finally settled and becomes law of the case. *Atlas Scraper & Engineering Co. v. Purscne*, 357 F. 2d 296 (9th Cir. 1966). A second court of appeals is not to enter an order inconsistent or contradictory to the opinion of a prior panel. *May Department Stores v. Reynolds*, 140 F. 2d 799 (8th Cir. 1944).

A review of respondents' Petition For Rehearing, including Motion for Judgment *n.o.v.* Petition for New Trial and Suggestion for Appropriateness for Rehearing En Banc discloses that their central attack is not upon the substantiality of the evidence, but upon the application of legal standards to the jury's answers to the special interrogatories. Defendants' first arguments are contained in their Petition for Rehearing (Cr. 371-376).

There, they attack their own special interrogatory form. They claim contrary to their face that the answers did not establish a conspiracy in restraint of trade. They claim an actionable conspiracy arises only when the conspirators are horizontal competitors. They then urge that even assuming a vertical conspiracy, the conspiracy was not *per se* unlawful and that the conspiracy here was not in restraint of trade because of their defense that the restrictions on advertising reflected only a desire to avoid damage done by carpetlayers. They urged that a relevant market was not defined and that an erroneous answer to a special interrogatory necessarily affected all answers (Cr. 374-376). All these contentions were in the Petition for Rehearing which was denied in *Gough I.*

Clearly, a court of law must recognize these attacks as frivolous under the present state of antitrust law and under the express findings of the jury.

The plea that a conspiracy cannot be found here because the defendants and co-conspirators asserted they were working toward a common enterprise of building and marketing a housing development is directly contradictory to this Court's opinions in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The very case cited, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969) is contrary to the contention advanced.

There is no need to prove a relevant market in the §1 action. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Further, the relevant market was designated

to be Rossmoor Leisure World, and respondents fully recognized this as a separate part of commerce in their drafting of the interrogatories. An intent and purpose to enter into an anti-competitive conspiracy was expressly found by the jury in answer to interrogatory Nos. 1 and 2 on their very form.

The respondents' defense of injury by carpetlayers, which was shown to be sham, is not cognizable at law. This conspiracy is unlawful *per se. Associated Press v. United States,* 326 U.S. 1 (1945); *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963). Petitioners' evidence was so substantial that a trial court could not have any judicial doubt in entering judgment for plaintiff.

Turning to the motion for judgment notwithstanding the verdict, Petition for Rehearing, Part III, although the heading purports to discuss the substantiality of evidence, it, in fact, reargues the same issues of law which the respondents discussed in Part I of the Petition for Rehearing. Here again the argument is that as a matter of law, the mutual purpose of the respondents and their co-conspirators allows their entry into an anti-competitive conspiracy. The other attack in this section is only addressed to their evidence in support of the defense there was no conspiracy. It fails entirely to discuss the substantiality of the evidence that the plaintiff offered in proof of the conspiracy. Mr. Robert Nelson never contradicted the testimony of Mr. Cronin that Mr. Nelson was talking with Mr. Cortese at the time the order went out to restrict advertising of carpets and drapes to Crestmark. Whether Mr. Nelson denied or did not deny the testimony of Mr. Ferris (Tr. 423), the record is abun-

dantly clear that substantial evidence exists in support of the jury's answers to the interrogatories. Mr. Nelson had also filed affidavits submitted to the F.H.A. that there was no identity of interest between Rossmoor Corporation and the Mutual Corporations, of which he was an officer (Pl. Ex. 183, Tr. 413-416). Yet his employer, Leisure World Foundation, was backed, at least to the extent of $1,000,000 loan guarantee, by the owner of Rossmoor Corporation. Nor is there any dispute of the fact that Mr. Nelson personally did not approve of the Leisure World policy of restrictive advertising and took steps to change the policy by visiting the officers of Leisure World who were in the same headquarters building with Mr. Cortese (Tr. 382-444, 450, 452).

Defendants do claim to attack the sufficiency of the damage award but in reality their arguments are addressed to fact weighing. Their attack is answered by the opinions of this Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). It is clear that the trial court was correct in not entertaining these arguments of law in the face of the opinion in *Gough I*.

2. The Appellate Court in Gough I Did Not Require Arguments on Motions for a New Trial.

A motion for a new trial does allow judicial fact weighing. But clearly the trial court with knowledge of the evidence and record could not order a new trial consistent with the opinion of the court of appeals. Since it

knew of the overwhelming nature of petitioner's evidence, the determinations of law by the court of appeals could not allow a new trial. This petitioner is an injured victim of conduct forbidden by Congress. The trial court could not have any judicial doubt that judgment must be entered for petitioner. Nor could it fail to follow the court of appeals direction that the case was established as a matter of law.

It is respectfully submitted that a court of appeals does not issue an opinion of the kind written here without it being said that expressly or impliedly there is no question of a right of plaintiff to judgment.

B. Even Assuming that Gough I Did Not Decide the Issue of Sufficiency of Evidence an Appellate Court Is Compelled by the Antitrust Decisions of This Court to Find Liability as a Matter of Law.

1. The Evidence of a Discriminatory Policy Which Favors and Protects a Group of Corporations From Competition Is Illegal Per Se. This Is Especially So When the Acting Parties Have a Trust Relationship to the Consuming Public.

Private actions under the antitrust laws were designed by Congress so that a plaintiff such as Mr. Rosen should come forward and expose the conspiracy involved here. There is no dispute that Leisure World Foundation had a trust relationship with the owners of the Manors at Rossmoor, further, that Mr. Cortese knew of this trust relationship. Notwithstanding these circumstances, defendants admit that a restrictive policy was promulgated by Leisure World Foundation. Further, it was not disputed at the trial that the policy's sole beneficiaries were Crestmark and Rossmoor Corporation. The issue that defendants raised was whether or not Mr. Cortese or Crestmark was

the man or company who put the policy into effect. The evidence is overwhelming that Mr. Cortese did so. But even assuming not, the evidence that Crestmark was the beneficiary of the policy known to restrain trade and commerce was actionable as a matter of law. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). *United States v. General Motors Corp.*, 384 U.S. 127 (1966). As stated in *Albrecht v. Herald Co.*, 390 U.S. 150, fn. 6:

> "Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced policy applied to all carriers, most of whom acquiesced in it."

Since defendants admit unity with the publisher in seeking development of the community, contrary to their representations to the F.H.A., the admitted facts require a judgment for petitioner. The necessary consequence of the restrictive advertising policy was to restrain free market entry.

It is clear that the Court of Appeals in *Gough II* in the light of the record here and applicable law should not have remanded this case.

III

THE DECISION BELOW IS IN CONFLICT WITH THE SETTLED RULE OF LAW THAT CASES ARE NOT REMANDED UNLESS ERROR IS DISCLOSED.

A. The Court Below Denied the Motions of the Respondents and on the Second Appeal They Failed to Show Any Error Which Disallowed a Judgment for Petitioner.

The opinion of the trial court on remand dated October 8, 1974, is based upon the motion of the plaintiff to enter judgment following the decision of the court of appeals in *Gough I*. Following this determination and ensuing judgment, defendants then filed motions for judgment *n.o.v.* and for a new trial. These were denied (Cr. 559). Indeed, respondents sought to tax costs based on the denial of this motion. The denial of these motions was not shown by respondents on their appeal to be in error. They only argued that the reasons for the denial of the motions were based upon court's belief it was precluded from hearing the matters on the merits. But the respondents made motions to the trial court, and they were denied by the trial court which was fully familiar with the record and fully cognizant of the contentions of the parties.

It is respectfully submitted that it was incumbent upon respondents to show errors of law on appeal as to these rulings and they completely failed to do so. Petitioner should not be required to assume the burden of arguing matters presented to the first appellate court and the trial court after a second appeal. A court does not reverse a judgment unless error is shown. Two courts had reviewed the record and found nothing justifying a specific call to hear arguments claiming error.

The trial court under the mandate in *Gough I* had absolute discretion to conclude that judgment should be entered for petitioner. The mandate in *Gough II* recognizes the discretion of the trial court and that exercise has been applied to enter judgment for petitioner. Substantial justice requires the termination of this litigation. See *Perkins v. Standard Oil Co. of California,* 395 U.S. 642 (1969).

CONCLUSION

It is respectfully urged that for the foregoing reasons a writ of certiorari be granted.

Dated, June 18, 1976.

MAXWELL KEITH,
PHILIP KEITH,
ANTHONY J. MERCANT,
MERCANT & O'BRIEN,
By MAXWELL KEITH,
Attorneys for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-1138
75-1139

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,
vs.
Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[March 17, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WRIGHT and KILKENNY, Circuit Judges and CHRISTENSEN,* Senior District Judge.

WRIGHT, Circuit Judge:

This antitrust case appears before us for the second time. At trial the jury returned a verdict for defendant Rossmoor through answers to special interrogatories. On appeal this court determined that one of the interroga-

*Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

tories was improperly submitted to the jury and that the jury's answer was wrong as a matter of law. With this answer disregarded, all remaining jury answers were in favor of plaintiff Gough. *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973).

This court originally directed that

> [i]n view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed and the cause remanded for this purpose.

Rossmoor petitioned for rehearing and included within that petition motions for judgment n.o.v. and new trial. The petition was denied, without reference to the motions included therein. However, this court modified the order quoted above, to read as follows:

> The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

487 F.2d at 378.

On remand, Rossmoor renewed its motions for judgment n.o.v. and new trial. The trial judge, believing that he was foreclosed by our modified opinion from exercising his discretion as to these motions, denied both of them.

The sole issue presented is whether the trial judge correctly determined that our order remanding "for further proceedings consistent with this opinion" foreclosed his subsequent exercise of discretion on the motions for judgment n.o.v. and new trial. We hold that he did not.

That this court might have considered the motions for judgment n.o.v. and new trial on their merits is made clear by the Court in *Neely v. Eby Construction Co.*, 386 U.S. 317, 323 (1967). However, more often than not this

court should refer such motions, arising for the first time on appeal, to the trial court so that it can first pass on them. *Id.* at 323-26. *See also Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967).

Unless this court expressly or by clear implication disposes of motions raised for the first time on appeal, it must be presumed that they will first be acted upon by the trial court on remand. The above rule is necessary to insure that *some* court consider the merits of the motions which a party is entitled to present.

In the first appeal of the instant case, this court neither expressly nor by clear implication ruled on the motions presented in the rehearing petition. To the contrary, the modification of the order from one requiring that "judgment . . . [be] entered for plaintiff" to one remanding "for further proceedings consistent with this opinion" strongly implied that the motions were to be entertained below on remand.

Gough directs our attention to certain language in our earlier opinion regarding the jury's factual findings on (a) power and intent to exclude, and (b) damages. We said those findings "established, as a matter of law," that defendants had engaged in illegal conduct which injured plaintiff. 487 F.2d at 376. Gough argues that by this language the court effectively denied the motions for judgment n.o.v. and new trial. We disagree.

Read in context, the use of the term "matter of law" suggests that the factual issues of power and intent, and damages, were as a matter of law properly presented to the jury. By contrast, the interstate commerce issue should not have been submitted to the jury, since "[t]he

undisputed facts established that the necessary relationship to interstate commerce did exist." 487 F.2d at 377.

Nowhere in the course of the opinion preceding the phrase "matter of law" does this court set forth the evidence in such a way as to support a conclusion that the jury *must*, "as a matter of law," have found for plaintiff. Therefore, the "matter of law" language may mean that if the jury's answers were properly based on adequate evidence, the judgment must under law be for the plaintiff. If this interpretation is correct, the trial judge must now decide, in entertaining the motions for judgment n.o.v. and new trial, whether the evidence supported the jury's answers.

Assuming, without deciding, that Gough is correct in interpreting the "matter of law" language as being in effect a denial by this court of the motions presented, we would still reverse. The number of possible interpretations of the "matter of law" language suggests that none of them is supported by "clear implication." Thus the interpretation suggested by Gough, even if correct, cannot foreclose the exercise of discretion by the trial judge on remand.

Since the trial judge acted on the mistaken assumption that he could not adjudge the motions for judgment n.o.v. and new trial, we must remand so that he may do so. *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951).

The cause is remanded for the trial judge's consideration of the merits of Rossmoor's motions for judgment n.o.v. and new trial.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 26,475

Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellant,

vs.

Rossmoor Corporation, Golden Rain Foundation, Leisure World Foundation, and Crestmark Carpet and Drapery Company.
Defendants-Appellees.

[October 17, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, DUNIWAY, and GOODWIN,
Circuit Judges

BROWNING, Circuit Judge:

Plaintiff sued defendants for treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) for violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The case was submitted to the jury on special interrogatories. The jury responded that defendants had entered into a conspiracy to exclude plaintiff from the

business of selling at retail in a local market products produced in other states, that they had restrained plaintiff's retail business to his damage, but that their acts had not had "a substantial effect on interstate commerce or the flow of interstate commerce." Because of this negative answer regarding the effect of defendants' conduct on interstate commerce, the district court entered judgment for defendants. We reverse.

Plaintiff was sole proprietor of a retail store selling carpets, drapes, and household furniture in Walnut Creek, California. Defendants are two members of a group of corporations that buy and sell land and construct, sell, furnish, and manage residential developments. These developments are referred to individually and collectively as "Rossmoor Leisure World."

Defendant Rossmoor Corporation is the primary developer. Defendant Crestmark Carpet and Drapery Company is a wholly owned subsidiary of Rossmoor that sells carpets and drapes to residents of Rossmoor Leisure World, including the development in the Walnut Creek area.

All the carpeting sold by plaintiff and defendant Crestmark to residents of the Walnut Creek Rossmoor Leisure World during the relevant period was manufactured outside California and shipped to plaintiff and defendant Crestmark either directly or through in-state wholesalers.[1]

[1]Defendant Crestmark's sales of carpeting and padding to residents of Rossmoor Leisure World at Walnut Creek exceeded $380,000 in 1965, $565,000 in 1966, and $305,000 in 1967. The volume of plaintiff's sales of carpeting to residents of the development is not entirely clear from the record, but defendants conceded at oral argument that such sales were not *de minimis*. Moreover, plaintiff testified, and the jury necessarily found, that such sales would have been substantially greater but for defendants' acts.

In response to interrogatories submitted under Rule 49(a), Fed. R. Civ. P., the jury found that defendants and their subsidiaries had the power and intention to exclude plaintiff from the business of selling carpeting to residents of the Walnut Creek Rossmoor Leisure World; that they entered into a scheme to prevent plaintiff from advertising in the Leisure World News, a "house" newspaper for that development, "such as to act as a restraint on plaintiff's business"; and that, as a result, plaintiff suffered some $50,000 damages in loss of profits and good will. However, to the question "Did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?" the jury answered "No"[2] Judgment was entered for defendants on the ground that this last answer deprived the court of jurisdiction under the Sherman Act.

The jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given de-

[2]The written submission to the jury read as follows:

The following questions are being submitted to you for your answer in order to aid the Court in reaching a decision in this matter.

You should recognize that your answers to these questions will be the basis for the Court's decision which will decide whether or not the plaintiff is entitled to recover or not from the defendants.

You are to answer the following interrogatories as applicable. Before any question may be answered, all 12 of the jurors must agree on the answer.

1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

Yes X

No .....

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foun-

fendant's conduct was of the kind prohibited by the Act. *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517, 521-24 (9th Cir. 1973). The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558-59 (1944). The jurisdictional question, therefore, is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 521. This, in turn, depends upon whether defendants' conduct had a "substantial economic effect" upon interstate commerce, or, "'concerns more States than one' and has a real and substantial relation to the national interest" in a competitive economy. *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 255 (1964)

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dation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes X
No .....

3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes .....
No. X

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes X
No .....

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143.00
Goodwill	22,738.00

quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824); *see Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 522-23. *See, generally,* 1 von Kalinowski, Antitrust Laws & Trade Regulation § 5.01[4] (1969).

The substantive issue, on the other hand, is whether defendants participated in anticompetitive conduct of the kind encompassed within the statutory terms "restraint of trade," "monopolize," or "attempt to monopolize." In terms of this case, the substantive question was whether defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News, and if so, whether such conduct was the kind of anticompetitive conduct prohibited by the Act.

Thus, although the substantive and jurisdictional issues are often confusingly described in terms of the "effect" of particular conduct upon commerce, as if a common question were presented, *see, e.g., Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739-40 n.3 (9th Cir. 1954), the substance of the two inquiries is quite different. An unreasonable restraint on competition may have no impact upon interstate commerce, or an impact so insignificant that regulation under the Commerce Clause is not justified as a means of protecting interstate commerce. *Page v. Work,* 290 F.2d 323, 331-32 (9th Cir. 1961). Or conduct clearly having a substantial economic impact on interstate commerce may not violate the Act's prohibitions against unreasonable restraints of trade and monopolization. *Cartrade, Inc. v. Ford Dealers Advertising Ass'n,* 446 F.2d 289, 292 (9th Cir. 1971).

When the issue is whether the defendant's conduct violates the norms of the statute, the focus is upon commercial competition: whether the defendant's conduct—"in" or "affecting" interstate commerce or not—unreasonably restrains competition in the market place. When the issue is whether jurisdiction exists, the focus is upon interstate commerce: whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause.

In the present case, the jury's factual findings that defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News established, as a matter of law, that defendants had engaged in the type of anticompetitive conduct that Congress intended to prohibit by the Sherman Act. The jury's further findings that plaintiff suffered monetary damages in a determined amount by reason of defendants' conduct, established, as a matter of law, that plaintiff was among the class of private persons authorized by the Clayton Act to seek redress for such conduct. Defendants do not argue to the contrary.

The sole question here is jurisdictional: did defendants' conduct have a sufficient relationship to interstate commerce to be within Congress' power to regulate, and hence to come within the Sherman Act?

Defendants argue that the jury's specific finding that defendants' acts did not have a "substantial effect on interstate commerce or the flow of interstate commerce" is conclusive of jurisdiction. We disagree.

It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually "completely intermeshed," *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-63 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits. *See Page v. Work, supra,* 290 F.2d at 334; *Bailey's Bakery, Ltd. v. Continental Baking Co.,* 235 F.Supp. 705, 714 (D.C. Hawaii 1964); 5 Wright & Miller, Federal Practice & Procedure § 1350, at 556-58; 5 Moore's Federal Practice ¶38.36 [2.-2], at 298-300; *but see Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F.2d 934 (9th Cir. 1959).[3]

Even assuming, however, that the resolution of conflicts in the evidence as to jurisdictional facts is the function

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[3]Professor Moore summarizes the policy considerations supporting this view as follows:

> As a matter of policy, however, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation. The difference is this: if coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which underlying facts are not in dispute, but different inferences may be drawn from them. Thus on the same business arrangements one case may be decided one way and another in a different way, as the jury may find that the arrangements did or did not affect commerce . . . . Surely these are matters that should be treated as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. When there is . . . in the case of the antitrust case a factual question as to details of the defendant's business activities, such questions could be put to the jury as special interrogatories, or a special verdict employed.

5 Moore's Federal Practice ¶ 38.36 [2.-2], at 300.

of the jury, the jury must be given adequate instructions as to the legal standard to be applied. *Ratigan v. New York Central R.R.*, 291 F.2d 548, 554 (2d Cir. 1961); 5A Moore's Federal Practice, *supra*, ¶49.02, at 2206 n.7; 9 Wright & Miller, Federal Practice & Procedure, *supra*, § 2506, at 502. The interrogatory submitted to the jury in the case (question "3," *supra* note 2) did not inform the jury of the constitutional tests for determining whether the relationship between defendants' conduct and interstate commerce was such as to permit Congress to prohibit defendants' conduct. Nor was the general explanatory instruction given to the jury adequate to this purpose.[4]

In any event, there was no conflict in the evidence as to the facts relevant to jurisdiction. The undisputed facts established that the necessary relationship to interstate commerce did exist. In these circumstances, it was error to submit the jurisdictional issue to the jury under Rule 49(a). *Wirtz v. La Fitte*, 326 F.2d 856, 858-60 (5th Cir. 1964); *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 902-03 (8th Cir. 1957); 9 Wright & Miller, *supra*, at 499. The jury's erroneous answer to the jurisdictional interrogatory should have been ignored. *Ratigan v. New York Central R.R., supra*, 291 F.2d at 554-55; *W. R. Grimshaw Co. v. Nevil C. Withrow Co., supra* 248 F.2d at 902-05; *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 99-103 (1st Cir. 1932).

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[4]The only relevant portion of the instructions reads (Tr. 1310):

> The Sherman Act applies to parties whose acts are in the course or flow of commerce across state lines or whose acts, although local, substantially affect interstate trade and commerce. By substantial the law means not de minimis—not insignificant, an amount more than trifling. The amount of interstate trade involved, if substantial, is not material, since the Sherman Act brands as illegal the character of the restraint, not the amount of commerce affected.

We need not stop to inquire whether retail sales of carpeting to Rossmoor Leisure World residents occurred "in" interstate commerce, for it is clear that defendants' anticompetitive conduct in connection with such sales necessarily had the "substantial economic effect" upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a "substantial" volume of carpeting from the states of manufacture to the Walnut Creek, California, area. *See Cartrade, Inc. v. Ford Dealers Advertising Ass'n, supra*, 446 F.2d at 292. Elimination of competition in these intrastate sales of goods produced in other states "inevitably" affected the interstate commerce in such goods: "When competition is reduced, prices increase and unit sales decrease," resulting in fewer purchases from out-of-state producers. *Burke v. Ford*, 389 U.S. 320, 322 (1967). By restricting plaintiff's participation in these retail transactions, and eventually excluding plaintiff entirely from this trade, defendants diverted interstate shipments of carpeting from plaintiff to themselves, thus "interfer[ing] with the natural flow of interstate commerce." *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). The states in which the carpeting is manufactured as well as the State of California are concerned with the conditions under which carpeting is sold at retail to California residents. And the relationship between the elimination of competition in these retail sales of carpeting at Rossmoor Leisure World and the national interest in the distribution of carpeting in a free competitive economy is not so tenuous as to bar federal intervention, though the market monop-

olized in this instance was small. *Id.* at 213-14. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

Jurisdiction under the Sherman Act was therefore clearly present. The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

Appendix C

In the United States District Court
for the Northern District of California

Civil No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff,
vs.
Rossmoor Corporation, et al.,
Defendants.

[Filed Oct. 8, 1974]

JUDGMENT OF MANDATE
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

This case originally came on for trial before a jury upon interrogatories agreed upon between the parties. The interrogatories and the answers given to them by the jury were as follows:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

"Yes.

"2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

"Yes.

"3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

"No.

"4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

"Yes.

"5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

"Net Profits	$18,143.00
"Goodwill	22,738.00"

It is apparent that the jury made findings to the effect that the defendants and others had the power and design to and actually did engage in conduct which acted as a restraint on the plaintiffs' business of selling carpets or other merchandise at the locale involved. It is also clear that the jury determined the monetary loss suffered by the plaintiffs by reason of such conduct.

It is equally apparent that by answering question number three in the negative the jury indicated that such

restraint did not have "a substantial effect on interstate commerce or the flow of interstate commerce."

On appeal the Court of Appeals for this Circuit held that the answers to the interrogatories other than interrogatory number three made irrelevant the jury's response to that interrogatory. The Court stated:

> "For it is clear that the defendants' anticompetitive conduct in connection with such sales necessarily had the 'substantial economic effect' upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a 'substantial' volume of carpeting from the states of manufacture to the Walnut Creek California area, citing Cartrade, Inc. v. Ford Dealers' Advertising Association, *supra*, 446 F.2d at 292."

The Court of Appeals therefore set aside the judgment in favor of the defendants which had been entered by this Court based upon the jury responses to the interrogatories.

In its original order the Court of Appeals stated:

> "In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose."

Thereafter, the original defendants, the appellees, filed a document entitled Appellee's Petition for Rehearing Including Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Suggestion of Appropriateness of Rehearing En Banc. That document not only undertook to reargue the merits of the original appeal, but

also, as indicated in the title, contended that the trial court had erred in not granting their motion for directed verdict and pursuant to what they contended to be the teaching of Neeley v. Martin K. Eby Construction Co., 386 U.S. 317, they urged that the Court of Appeals itself enter an order by way of judgment notwithstanding the verdict. Further, also relying upon the *Neeley* case they urged that the Court of Appeals order the grant of a new trial.

These two parts of the motion were based upon allegations that there was not sufficient evidence to sustain the jury's finding of a conspiracy or the other elements of an alleged anti-trust violation and further that there was insufficient evidence to sustain the jury's verdicts as to the damages sustained from the anti-trust violations which they found to exist.

Upon consideration of the petition the Court of Appeals modified the last paragraph of the opinion by striking the two sentences quoted above and substituting the following as a separate paragraph:

> "The judgment is vacated and the cause remanded for further proceedings consistent with this opinion."

The order then ended with the following language.

> "The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

The appellant, the original plaintiff in the action, has now filed his motion in this Court to enter a judgment in his favor for the amount of damages ascertained in the jury's verdict, contending that this is the only action available to the Court under the remand from the Court

of Appeals. To the contrary, appellees, the original defendants, contend that they may now have heard by the trial court a new motion for judgment notwithstanding the verdict and their motion for a new trial as an alternative.

The answer to this question seems to have been resolved against the contention of the defendants-appellees by their contentions presented to the Court of Appeals in connection with their petition for rehearing. Part III and Part IV of their petition urged the Court of Appeals to enter a judgment n.o.v. or, in the alternative, an order granting a new trial. They based their contention that this was a proper procedure on the case of Neeley v. Martin K. Eby Construction Co., *supra,* and especially the *Neeley* case discussion of Federal Rule 50(d).[1] Although the rule itself states only that in the case of a party positioned as were the parties here, the appellees had open to them the right to argue that the judgment in their favor should have stood even though this Court incorrectly applied the jury verdict, by the process of requesting the appellate court to grant a new trial, the language of the Supreme Court extends to an appellee under such

---

[1]Rule 50(d) provides:

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963." Rule 50(d) Fed. R. Civ. P.

circumstances the further right to seek in the Court of Appeals an order for a judgment n.o.v. The Court said:

> "Rule 50(d) is applicable to cases such as this one where the trial court has denied a motion for judgment n.o.v. [After the jury verdict responding to the special interrogatories was filed the appellant here, the original plaintiff, filed a motion for judgment n.o.v. and for new trial. Both of these motions were denied by the trial court.] Rule 50(d) expressly preserves to the party who prevailed in the district court [Here the appellees.] the right to urge that the Court of Appeals grant a new trial should the jury's verdict be set aside on appeal. Rule 50(d) also emphasizes that 'nothing in this rule precludes' the Court of Appeals 'from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.' Quite properly, this rule recognizes the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless consideration of the new trial question 'in the first instance' is lodged with the Court of Appeals and Rule 50(d) is permissive in the nature of its direction to the Court of Appeals: As in Rule 50(c)(1) *there is nothing in Rule 50(d) indicating that the Court of Appeals may not direct entry of judgment n.o.v. in appropriate cases.*" 386 U.S. 317, 323-324. (Emphasis added).

This course of events is precisely what happened in this case. The plaintiff Rosen, complaining of the Court's interpretation of the jury verdict, filed a motion for judgment n.o.v. and for new trial. These motions were denied. Thus, the present appellees were the prevailing party on that motion. Rule 50(d) expressly authorizes them to

raise in the Court of Appeals all of the contentions that they now seek to make here which would authorize either a new trial or a judgment in their favor based on the theory that there was insufficient evidence to take the case to the jury in the first place. Of course all other grounds for the granting of a new trial, such as objections to either the admission or refusal of the admission of evidence, the measure of damages and the like would properly be contained in such motion.

In their motion for rehearing the appellees stated:

> "The [apppellate] court may either order a new trial itself or return the case to the district court for a ruling on the motion." Citing *Neeley* at 328-24, 325. (sic).

In the language of the Court on page 329 it seems to be decisive on the point.

> "In our view, therefore, Rule 50(d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the Court of Appeals. If he does so in his brief—*or in a petition for rehearing if the Court of Appeals has directed entry of judgment for appellant*—the Court of Appeals *may make final disposition of the issues presented,* except those which in its informed discretion should be reserved for the trial court. If appellee presents no new trial issues in his brief or in a petition for rehearing, the Court of Appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case. *Compare* Weade v. Dichmann, Wright and Pugh, Inc., *supra.*"

Here the order of the Court of Appeals stated unequivocally, following considerations of the petition for rehearing, "the petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

Thus, it is clear that the Court of Appeals declined to grant the petition for the entry of a judgment n.o.v. or the petition for the grant of a new trial. Neither did the Court determine that these questions should be remanded to the trial court for consideration. This Court construes the order of the Court of Appeals as having decided these issues on the merits, inasmuch as they were presented in full and denied by the Court.

The Court concludes that the judgment in favor of the defendants heretofore entered must be VACATED and judgment entered in favor of the plaintiff for three times the amount determined by the jury, together with costs and attorney's fees.

Elbert P. Tuttle
United States Circuit Judge,
Sitting by designation

Appendix D

STATUTES INVOLVED

Section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide (Sherman Act, Sections 1 and 2, July 2, 1890, Chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal. . . .

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Appendix E

In the United States Court of Appeals
for the Ninth Circuit

No. 75-1138
75-1139

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,

vs.

Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[Filed Jun. 4, 1976]

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and CHRISTENSEN, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Kilkenny have voted to reject the en banc suggestion.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

76-34

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1975

KERRY M. GOUGH, TRUSTEE IN BANKRUPTCY OF
LOUIS ROSEN, dba WALNUT CREEK FURNITURE,
Petitioner,
vs.
ROSSMOOR CORPORATION and CRESTMARK CARPET
AND DRAPERY CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

John B. Clark
James E. Harrington
PETTIT, EVERS & MARTIN
600 Montgomery Street
21st Floor
San Francisco, California 94111

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Table of Authorities Cited

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1975

No. 76-3

KERRY M. GOUGH, TRUSTEE IN BANKRUPTCY OF LOUIS ROSEN, dba WALNUT CREEK FURNITURE,
Petitioner,
vs.
ROSSMOOR CORPORATION and CRESTMARK CARPET AND DRAPERY CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN
OPPOSITION

Opinions Below

The opinions below are identified in the Petition, and copies of those opinions are appended thereto.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

For reasons which will be stated in a later section of this brief, petitioner's statement of the "Questions Presented" does not accurately portray the questions which are properly before the Court on this Petition. Accordingly, respondents submit the following alternative version of the questions presented:

1. Should this Court entertain a petition for a writ of certiorari to review an interlocutory judgment of a court of appeals which has remanded the case to the district court for initial consideration of pending motions for a new trial and for judgment notwithstanding the verdict?

2. When a court of appeals has reversed the verdict of a jury on special interrogatories and the verdict-winner and appellee has included in his petition for rehearing motions for a new trial and for judgment notwithstanding the jury's adverse answers to certain interrogatories, does the court of appeals abuse its discretion in remanding these motions for initial consideration by the district court?

3. Did the Court of Appeals for the Ninth Circuit properly interpret the opinion of a previous panel of that same court, which had directed the conduct of "further proceedings," when it remanded this action to the district court for initial consideration of pending motions for new trial and judgment n.o.v.?

Statutes Involved

Like his version of the Questions Presented, petitioner's description of the Statutes Involved in this proceeding is inaccurate. Since the merits of the case are not at issue for reasons which will be explained below, the Sherman and Clayton Acts have no bearing on the disposition of this Petition. The statutes which should actually guide the Court's decision on the Petition are Section 2106 of the Judicial Code (28 U.S.C. Section 2106) and Rules 50 and 59 of the Federal Rules of Civil Procedure. Copies of these statutes are attached to this Opposition as Appendix 1.

Statement Of The Case

The Statement of the case submitted by petitioner fails to provide a fair and complete account of the proceedings below and at the same time, unnecessarily includes a great deal of material which is unrelated to the issues

presented by the Petition. Particularly inappropriate is the inclusion of a lengthy recital of the trial testimony relating to petitioner's substantive claims under the antitrust laws. The apparent purpose of including this material is to lay the foundation for an argument on the merits of respondents' motions for a new trial and for judgment n.o.v. which are now pending in the district court. As will be demonstrated below, the merits of these motions are not before this Court at this time, since they have not yet been passed upon by any of the courts below. Respondents will therefore not burden the court with a detailed recital of the various distortions and inaccuracies which appear in petitioner's account of the trial testimony.* Instead, respondents will attempt to remedy the misplaced emphasis in petitioner's statement of the case by setting forth the following facts which actually have a bearing on the disposition of this Petition:

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* Respondents' views on the merits of petitioner's substantive claims and the merits of their pending motions for a new trial and for judgment n.o.v. are set forth in the Memorandum of Points and Authorities which was filed in support of their motion in the district court (R. 517-48).

Petitioner Kerry M. Gough is the trustee in bankruptcy of Louis Rosen, the former owner of a furniture and carpet store in Walnut Creek, California, who commenced this action in the United States District Court for the Northern District of California (R. 1-7). Rosen's complaint originally named four defendants: Rossmoor Corporation, a housing developer and contractor, Crestmark Carpet and Drapery Company, a subsidiary of Rossmoor Corporation, and Leisure World Foundation and Golden Rain Foundation, two non-profit corporations which administered Rossmoor Leisure World, a housing development for senior citizens constructed by Rossmoor Corporation (Id.). The complaint alleged that these defendants had conspired to exclude Rosen's carpet advertising from the Leisure World News, a "house" newspaper distributed free of charge by Leisure World Foundation to the residents of Rossmoor Leisure World (Id.). The claims against Leisure World Foundation and Golden Rain Foundation were dismissed during pre-trial proceedings and these parties were not defendants at the time of the trial (R. 92).

The case was tried to a jury before Judge Elbert Tuttle, sitting by assignment in the Northern District of California. At the close of plaintiff's case, the defendants moved for

a directed verdict in their favor (R. 995-1007). Judge Tuttle denied their motion but made the following remarks in the course of announcing his ruling (R. 1007):

> "THE COURT: Gentlemen, I think that this is a very thin case to go to the jury. It may be a case--of course, I won't tell the jury this--it may be a case which, if a jury verdict is found for the plaintiff and the proper motions are made, might upon careful study of the record, a careful study of it more carefully than I have been able to do in the constant days of trial, might have to be set aside.
>
> Counsel know about this procedure.
>
> I think it proper to submit it to the jury, as I say, even though the testimony from which inferences can be drawn that support a finding of illegal combination in violation of the Sherman Act are, as I say, rather thin."

The case was ultimately submitted to the jury on special interrogatories pursuant to Rule 49 of the Federal Rules of Civil Procedure (R. 226-27). On the basis of the jury's negative answer to Interrogatory No. 3, relating to the question of effect upon interstate commerce, the court entered judgment for the defendants (R. 285-87). Plaintiff's motion for judgment notwithstanding the Jury's verdict on the third interrogatory was denied (R. 287).

On plaintiff's appeal from this initial judgment, the court of appeals reversed the judgment, holding on several alternative grounds that the jury's finding of a lack of impact upon interstate commerce should have been set aside. Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973) (Petition, App. B.). Because the jury had answered the other special interrogatories favorably to the plaintiff, the court's original opinion, filed on October 17, 1973, directed the district court simply to enter judgment in the plaintiff's favor (R. 296):

> "In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose."

Defendants thereupon filed a petition for rehearing in which, among other things, they pointed out that a simple direction to enter judgment in plaintiff's favor was not appropriate, insofar as it would preclude defendants from raising any grounds for new trial or for judgment n.o.v. which they would have been able to raise if a verdict had originally been rendered against them at trial (R. 353-412). In addition to asserting various grounds for reconsideration and for rehearing en banc of the court's decision on the interstate commerce

issue, the petition included separate motions for a new trial and for judgment notwithstanding the verdict (R. 391-411).* These motions were included in the petition pursuant to the procedures prescribed by the Supreme Court in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) (R. 364-65). Pursuant to those same procedures, defendants' motions requested that the court of appeals grant the motions or, alternatively, that it remand the case to the district court for hearings on the motions (R. 391, 406, 411).

In response to the petition for rehearing, the court of appeals entered an order modifying its opinion by deleting the direction to enter judgment and by substituting a direction to conduct "further proceedings" in the district court, and otherwise denied the petition (R. 289). The entire text of the court's order is as follows:

---

* The petition was divided into four separate parts, having the following titles (R. 357-58):

I - Petition for Rehearing Addressed to the Panel

II - Petition for Rehearing by the Court Sitting En Banc

III - Motion for Judgment Notwithstanding the Verdict

IV - Motion for New Trial

"The last two sentences of the opinion filed October 17, 1973, are stricken, and the following sentence added as a separate paragraph:

> 'The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.'

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

Immediately following remand, plaintiff made a "Motion to Enter Judgment in Conformity with Mandate of Ninth Circuit" (R. 297-306). Plaintiff contended in his moving papers that the district court, notwithstanding the court of appeals' direction to conduct "further proceedings," should enter a "final judgment" and should decline to entertain motions by defendants for a new trial or for judgment n.o.v. (R. 303-06). The district court accepted plaintiff's position and filed an opinion holding that the court was precluded from entertaining such motions on their merits because motions for a new trial and for judgment n.o.v. had already been implicitly

denied by the court of appeals in its order entered in response to the petition for rehearing (R. 451-57; App. C to Petition). Accordingly, the court announced that it would decline to hear the motions and, after resolution of the matter of attorneys' fees, entered judgment for plaintiff in the amount of $172,643.00 plus costs (R. 451-57). Within ten days thereafter, for the purpose of protecting their record, defendants observed the formality of serving and filing in the district court their motions for a new trial and for judgment n.o.v., supported by briefs substantially identical to the briefs submitted in support of these motions as part of the petition for rehearing in the court of appeals (R. 517-48). An order denying the motions was entered on December 6, 1975 (R. 559).

Defendants thereupon appealed the judgment. The sole issue presented on this appeal was whether the district court had properly interpreted the earlier mandate in holding that it was precluded from adjudicating the merits of defendants' motions for a new trial and judgment n.o.v. (Opening Brief of Appellants, pp. 1-2). The court of appeals held that the district court had indeed misinterpreted the mandate and accordingly remanded the cause "for the trial judge's consideration of the merits of Rossmoor's motions for judgment n.o.v. and new trial" (App. A to

Petition). Following denial of his petition for rehearing, and before the trial court heard the motions on the merits, plaintiff filed his Petition for a writ of Certiorari in this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE PETITION SEEKS REVIEW OF AN INTERLOCUTORY ORDER WHICH MAY BE REVIEWED, IF NECESSARY, FOLLOWING FINAL JUDGMENT

A simple examination of the opinion below (App. A to Petition) should be sufficient to apprise the Court that the extraordinary relief of certiorari is not appropriate at this time. The Court of Appeals has remanded this case to the district court for consideration of respondents' motions for new trial and judgment n.o.v. The propriety of that order may be reviewed by this Court, if such review is necessary, following the disposition of those motions. The only harm that petitioner will suffer if such review is deferred is the risk of losing those motions on the merits. This is not the extraordinary threatened injury that justifies review by certiorari of interlocutory decisions.

A. The Courts Below Have Not Ruled On The Merits Of Respondents' Motions For New Trial And Judgment N.O.V. And Those Substantive Matters Are Not Ripe For Review By This Court

Petitioner suggests that the motions for new trial and judgment n.o.v., which the district court is to consider on remand, have already been decided on the merits, and therefore, are ripe for review by this Court. This is an incorrect characterization of the record.

As the opinions of both the district court and the court of appeals make clear (Appendices A and C to the Petition), the sole question which was litigated in the proceedings below was whether the trial court was foreclosed by the results of the first appeal from entertaining respondents' motions on their merits. The court of appeals answered this question in the negative and remanded the case for consideration of the motions by the district court. The filing of the Petition, however, has prevented the district court from actually undertaking consideration of the motions. At this stage, therefore, neither of the courts below has given any consideration to the merits of respondents' motions challenging the sufficiency of the evidence to support the jury's findings on liability and damages. Petitioner's suggestion that this Court should now consider

that issue therefore represents an unwarranted attempt to obtain initial consideration by the highest court in the land of the merits of motions which are specifically required by the Federal Rules of Civil Procedure to be addressed to the trial court and which in fact have never been ruled upon in this case by either of the courts below.

1. The Motions Have Not Been Ruled Upon By The Court Of Appeals

Petitioner argues that the Court of Appeals decided the motions in question in the first appeal of this action, when it remanded the case for further proceedings (Petition, 25-29). This is an argument that was briefed extensively in the second appeal of this action, when the appellate court decided that those motions had not been heard on the merits and remanded with specific directions to consider the motions. The reasoning of the Appellate Court is contained in its opinion, (App. A to Petition) and need not be expanded here.

2. The Trial Court Has Not Ruled Upon The Merits Of Respondents' Motions

Petitioner attempts to buttress his claim that the motions were heard on the merits by suggesting that the district court considered the motions on that basis following the first

appeal (Petition, 31-32). He indicates that the trial judge in this case actually did consider respondents' motions on their merits and denied them on the basis of a determination "from his knowledge of the record and the proceedings that the plaintiff, who had established all factual issues except as to jurisdiction in this court, had a right to judgment" (Petition, p. 3). Petitioner appears to be suggesting that the district court, despite its own announcement that it would decline to do so, specifically entertained and denied respondents' motions on their merits when the motions were formally filed following entry of judgment.

This contention represents not only a surprising about-face for a party who has contended throughout these proceedings that the district court was precluded from considering the merits of respondents' motions, but also a disingenuous attempt to mislead this Court regarding the contents of the record in this case. To demonstrate the validity of this admittedly serious accusation, it will be necessary to review in some detail the record of the proceedings in the district court following the remand from the first appeal of this case.

As noted in the Statement of the Case set forth above, immediately after remand from the

first appeal of this case, petitioner made a "Motion to Enter Judgment in Conformity with Mandate of Ninth Circuit" (R. 298-313). The purpose of that motion was to obtain entry of a "final judgment for plaintiff" which would preclude consideration of the grounds offered by defendants in support of the motions for judgment n.o.v. and for a new trial, which motions had been presented to the court of appeals and remanded for consideration by the district court (R. 298, 304-5). In his supporting papers, petitioner argued, as he argues here, that these motions had already been denied by the court of appeals and were thus foreclosed from further consideration by the district court (R. 304-5, 417-19).

After a briefing by counsel (R. 424-27, 584-93), the court rendered its ruling granting petitioner's motion and announcing that a "final" judgment would be entered in petitioner's favor (R. 451-57). The opinion of the trial court clearly states that this ruling was based on its determination that respondents' motions for new trial and judgment n.o.v. had been denied by the court of appeals, and that consideration of the merits of those motions was therefore foreclosed. (R. 454, 456-57; App. C to Petition, 28-29, 32).

Although this ruling of the court obviously precluded any consideration of respondents' motions on their merits, respondents nevertheless

formally filed their motions within ten days after the entry of judgment, as required by F.R.C.P. Rules 50 and 59. Respondents took this action for the sole purpose of preserving their record and of protecting themselves against a contention that they had waived their right to appeal from the court's refusal to hear their motions by failing to take the formal step of filing the motions (R. 517-49). In their memorandum accompanying the motions, respondents expressly conceded that the court's prior ruling required denial of their motions and that the motions were being filed merely as a formality (R. 524-25).

Petitioner's response to respondents' motions consisted solely of an argument that "[t]his Honorable Court has ruled that the defendants may not now raise their motion for Judgment notwithstanding the verdict or, in the alternative, their motion for a new trial," and that the filing of respondents' motions was "in patent conflict with the Court's decision" (R. 550-51). The district court thereupon denied the motions simply by pen-changing the word "granted" to "denied" in the form of order which had been submitted by defendants with their motions pursuant to Local Rule 114 of the Local Rules of Practice of the Northern District of California (R. 559).

No comment on this record is necessary in order to demonstrate that the district court refused, unequivocally and absolutely, to entertain defendants' motions on their merits. Petitioner's contrary representation is simply incorrect.

B. Petitioner Has Made No Showing Which Would Warrant The Extraordinary Relief Of Certiorari To Review An Interlocutory Order

As noted above, the court of appeals has remanded this case to the district court "for the trial judge's consideration of the merits of Rossmoor's Motions for judgment n.o.v. and new trial" (App. A to Petition). Those motions are now pending in the district court and will be decided by that court when the proceedings on this petition are completed. Depending upon the district court's ruling on the motions, it may be that a re-trial of this action will be required. In any case, it is entirely possible that further proceedings in the district court, and perhaps in this court of appeals will be necessary before this litigation is disposed of by the lower courts. In these circumstances it is quite clear that the judgment sought to be reviewed is not in any sense a "final judgment."

This Court has an established policy against piecemeal review of interlocutory orders of lower federal courts. See e.g. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Ry. Co., 389 U.S. 327 (1967) (certiorari denied for lack of ripeness where appellate court had remanded for further proceedings). See also American Construction Co. v. Jacksonville T&KW. Ry. Co., 148 U.S. 372, 384 (1893) (review of interlocutroy orders only when necessary to avoid extraordinary inconvenience).

There are, of course, exceptions to this rule, as when extraordinary and irreparable harm will occur in the interim preceding review of a final judgment. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (certiorari granted to review preliminary injunction restraining enforcement of presidential order directing seizure of steel mills on grounds of national emergency). However, petitioner has offered no reason for such extraordinary relief in this instance. Indeed, the only harm that will come to petitioner if his petition is denied is that respondents' motions for new trial and judgment n.o.v. will be heard on the merits. While one can certainly understand petitioner's desire to avoid such a hearing by a trial judge who has already characterized petitioner's proof of

antitrust liability as "very thin, this desire is not a justification for turning topsy-turvy the normal processes of judicial review.

II.

THE QUESTION OF THE POWER OF THE COURT OF APPEALS TO REMAND THE CASE TO THE DISTRICT COURT FOR INITIAL CONSIDERATION OF RESPONDENTS' MOTIONS FOR NEW TRIAL AND JUDGMENT N.O.V. DOES NOT WARRANT REVIEW BY CERTIORARI

The principal issue addressed by the court below was whether that court, by its modified opinion on the first appeal, intended to require the district court to entertain on the merits the motions for a new trial and for judgment n.o.v. which respondents had presented in their petition for rehearing. No question was raised below regarding the power of the court of appeals to require that the motions be considered in that manner, the only question being whether in fact it had done so (see App. A to Petition). In his Petition for Writ of Certiorari, however, petitioner for the first time raises such a challenge to the power of the court of appeals by suggesting somewhat obscurely at various points in his petition that the court may have been legally precluded from directing the district court to entertain respondents' motions (Petition

pp. 2, 4, 21-23). Petitioner's contention in this regard is altogether frivolous. It will here be demonstrated that the power of the court of appeals to do what it did in this case is firmly established by well settled legal principles, and that no serious question is presented by petitioner's vague intimation to the contrary.

A. The Power Of A Court Of Appeals To Remand A Case For Consideration Of Motions For New Trial And Judgment N.O.V. Is Well-Established And There Is No Conflict In The Circuits Which Would Merit The Attention Of This Court

The statutes governing the powers of the appellate courts to dispose of appeals from the district courts in situations of this kind clearly authorize the disposition that was made in this case. Section 2106 of the Judicial Code (28 U.S.C. Section 2106) provides that a court of appeals may in any case "remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances" (emphasis added). Rule 50(d) of the Federal Rules of Civil Procedure similarly provides, with respect to the very type of situation presented here, that "nothing in this rule precludes [the court of appeals] from determining that the appellee [whose judgment is reversed on appeal] is entitled to a new trial, or from

directing the trial court to determine whether a new trial shall be granted" (emphasis added).

As if the statute and the Rule were not enough, it happens that the issue of the power of a court of appeals to remand to the district court for initial consideration of motions for post-judgment relief made for the first time on appeal was discussed by this Court in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). In that case, a trial court denied a defendant's motions for new trial and judgment n.o.v. The appellate court reversed for insufficient evidence and instructed the trial court to dismiss the action. This Court affirmed, holding that the appellate court had the power to direct dismissal, and was not obligated to remand for consideration of the motion for new trial.

Although the principal issue decided in Neely was the authority of the court of appeals to decline to remand such matters, the Court simultaneously affirmed in its opinion the appellate court's power to require an initial determination by the district court of all questions affecting an appellee's right to post-judgment relief. Thus the Court stated (386 U.S. at 323-24):

> "Rule 50(d) . . . emphasizes that 'nothing in this rule precludes' the court of appeals 'from determining that the appellee

> is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. Quite properly, this Rule recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question 'in the first instance' is lodged with the court of appeals."

Indeed, the opinion strongly suggests that in the usual case it is preferable for the court of appeals, notwithstanding its power to do otherwise, to refer such motions for initial consideration by the district court on remand. Thus the Court states (386 U.S. at 325):

> "[The appellee] may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues - because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert."

This suggestion was reinforced in a case decided shortly after Neely, where the Court reversed a court of appeals' denial of a motion for new trial made in a petition for rehearing by a verdict-winner whose verdict had been set aside on appeal. The Court cited Neely and held that "the case should have been remanded to the Trial Judge, who was in the best position to pass

upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers." Iacurci v. Lummus Co., 387 U.S. 86, 88 (1967). It would thus appear that the power of the court of appeals to remand for these proceedings is well settled. In this regard it should be noted that petitioner has not directed the Court's attention to any conflict in the circuits on this matter, and respondents are aware of no such conflict.

Lacking any unsettled question to present to this Court, petitioner attempts to manufacture one by suggesting two limitations on the power of appellate courts to remand matters for further consideration, neither of which is stated in the applicable statutes. First, he suggests that the power to remand post-trial motions for consideration by the district court applies "to only those matters which would raise the trial court's first hand knowledge of the witnesses and feel for the overall case," and that all other matters are legally required to be finally determined by the court of appeals itself without remand. (Petition, p. 22). The simple response to this contention is that it is irrelevant. Even the most cursory perusal of respondents' motions will reveal that they raise precisely the types of issues which can best be resolved by a judge who has a "feel for the overall case" (see R. 517-48;

Appendix 2 hereto). A more significant response to this contention, however, is that it is unsupported by any authority. Neither section 2106 of the Judicial Code nor Rule 50 imposes any such qualification on the appellate courts' powers. Nor does the Neely opinion contain anything supportive of such a peculiar limitation. Although both Neely and Iacurci v. Lummus Co., supra, suggest that a court of appeals may have an affirmative obligation to remand to the district court motions by an appellee which present such questions as the credibility of the witness and the weight of the evidence, nothing in either opinion intimates that the court is forbidden to remand motions for post-judgment relief where such factors are not present.

The second limitation which petitioner offers to the power to remand is based on a distinction between motions for new trial and motions for judgment n.o.v. Petitioner notes that Neely involved only a motion for a new trial, whereas this case involves both a motion for a new trial and a motion for judgment n.o.v., and intimates that this might somehow have limited the court of appeals' powers with regard to disposition of respondents' motions (Petition, pp. 23-24). Again, petitioner's suggestion is unsound. While respondents concede that this

case appears to be unique insofar as it involves a motion for judgment notwithstanding the verdict by a party in whose favor the verdict was rendered, this peculiar circumstance does not provide any ground for treating the case as an exception to the principles established by the Neely decision with respect to the verdict-winner's right to seek post-judgment relief following reversal of his verdict on appeal. Since it is clear that the verdict "winner" in this type of situation should have an opportunity at some point following reversal of his verdict to attack the sufficiency of the evidence supporting the adverse findings, and because motions for judgment n.o.v. normally accompany motions for a new trial in all other circumstances, it seems clear that the principles enunciated in Neely to govern the disposition of new-trial motions by a verdict-winner who loses his verdict on appeal should apply equally to motions for judgment notwithstanding the jury's adverse verdict on certain special interrogatories. Petitioner has offered no reason why the powers of the courts of appeals to dispose of such motions should not be co-extensive in both of these types of situations. Respondents submit there are no such reasons.

B. Respondents Motions For New Trial And Judgment N.O.V. Were Timely Made

Petitioner makes a final challenge to the court of appeals' power to dispose of respondent's motions by a remand to the district court by contending that the motions were procedurally defective in that respondents failed to bring the motions before the court in a proper and timely manner. Petitioner argues that respondents "did not comply with Rule 50(b)" of the Federal Rules of Civil Procedure inasmuch as they failed to move for post-judgment relief within ten days after the initial judgment was entered (Petition, pp. 2, 22-23). This argument, like the preceding one, is raised for the first time in the Petition.

Petitioner's argument either misreads the Rule or overlooks the fact that the initial verdict and judgment in this case was in favor of respondents. Rule 50(b) provides only that the losing party in a jury trial may, within ten days after entry of judgment against him, "move to have the verdict and any judgment thereon set aside." Obviously, the party in whose favor the verdict and judgment has been rendered not only need not, but cannot, make a motion to have that very verdict and judgment "set aside." It is only when his verdict and judgment have been

overturned, either by the trial court in post-judgment proceedings under Rules 50 and 59 or by the appellate court, that the occasion first arises for the initially successful party to seek such relief.

Rule 50(c)(2) expressly supports this conclusion, with respect to motions for a new trial. It provides that a verdict-winner who loses his verdict in post-judgment proceedings in the trial court need not make his motion for a new trial until "10 days after entry of the judgment notwithstanding the verdict." The opinion in Neely, supra, similarly interprets Rule 50(d) to allow a verdict-winner who loses his verdict at the appellate level to make his motions for post-judgment relief for the first time following entry of judgment against him in the court of appeals. Thus the Court's opinion states (386 U.S. at 329; emphasis added):

> In our view, . . . Rule 50(d) makes express and adequate provision for the opportunity - which the plaintiff-appellee had without this rule - to present his grounds for a new trial in the event his verdict is set aside by the court of appeals. If he does so in his brief - or in a petition for rehearing if the court of appeals has directed entry of judgment for appellant - the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court."

Respondents recognize, once again, that both Rule 50 and the Neely opinion deal with motions for a new trial and do not expressly consider the unusual case presented here. This, however, is a distinction without a difference. It must be conceded that the duty to move for judgment n.o.v. does not arise until an adverse verdict is rendered. When that adverse verdict is not rendered until the appeal, Rule 50, Neely, and common sense dictate that the right to move for such relief be available at that time. Otherwise parties will be put in the anomalous position of moving to set aside favorable verdicts.

Petitioner's contention that respondents' motions for post-judgment relief were not properly presented to the courts below is thus shown to be entirely without merit. Indeed, as the Statement of the Case indicates, respondents scrupulously complied with all of the procedures prescribed in Neely for bringing these matters to the court's attention. Immediately following reversal of the verdict in their favor, they filed a timely petition for rehearing and rehearing en banc of the court's decision on the interstate-commerce question, which expressly included motions for judgment notwithstanding the verdict and for a new trial (R. 353-412).

When the appellate court failed to decide the subject motions and remanded for further proceedings, respondents renewed their motions and diligently pursued their rights in the district court. The details of respondents' efforts in this regard are adequately set forth in the Statement of the Case.

There can thus be no serious question that the procedures followed by respondents were adequate to bring their motions before the court of appeals and the district court in the manner contemplated by the principles enunciated in Neely, supra. Petitioner's arguments to the contrary are thus exposed as an effort to penalize respondents for not having moved to set aside a verdict rendered in their favor. Respondent's unwillingness to move to set aside a favorable verdict is certainly understandable, and their diligence in moving to set aside the verdict following reversal is clear on the record.

Thus, petitioner's belated and half-hearted attempt to suggest to this Court that the action of the court of appeals was legally improper or that respondents' motions were not properly and timely presented to that court raises no issue which merits serious consideration. To the extent that there ever were any serious questions regarding the courts of appeals' powers or the proper

methods of proceeding in situations of the type presented here, all of those questions were definitively resolved in Neely, supra, and petitioner has shown no reason why any of the principles established in that decision should now be re-examined.

III.

THE QUESTION WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED ITS OWN PRIOR ORDER OF REMAND IS NOT A QUESTION OF GENERAL SIGNIFICANCE AND, IN ANY EVENT, THE RESULT REACHED BY THE COURT OF APPEALS WAS UNQUESTIONABLY CORRECT

The only remaining question is the one that was actually litigated in the court below - namely, whether the court of appeals' modification of its opinion on the first appeal to require "further proceedings" mandated consideration of respondents' motions on the merits by the district court. Unlike most of the issues sought to be raised by petitioner, this is concededly a legitimate issue. At the same time, however, it is hardly an issue of sufficient importance to satisfy the standards which normally govern this Court's discretionary selection of cases from the courts of appeals to be reviewed by writ of certiorari. An interlocutory decision by a court of appeals, interpreting the meaning of the words "further proceedings" as used in the mandate of a prior

panel, is hardly an "important question of federal law" within the ambit of Rule 19 of the Rules of this Court.

Once it is recognized that the Court of Appeals on the first appeal of this case had the authority either to remand respondents' motions to the district court or to decide the motions itself, the only question is which of those options the court in fact chose to exercise. As the parties' briefs and the opinion of the court below reveal, that issue can only be resolved by means of a particularized analysis of the language of the prior opinion and the order modifying the opinion and of the circumstances surrounding the entry of that order (see Appendix A to the Petition; Opening Brief of Appellants, pp. 15-23). While such matters may be of great interest to the litigants and to the court that must decide them, they are obviously of no significance outside the bounds of the particular case. They involve no general legal principles, and they relate to a fact situation which is unlikely ever to be repeated. See, e.g., Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954) (certiorari dismissed as improvidently granted when subsequent events made case one of isolated significance). In addition, even if the record below is read in the manner most favorable to

petitioner, this case, at best, concerns one panel's doubts about the previous decision of a panel of the same court. As was noted in Wisniewski v. United States, 353 U.S. 901, 902 (1957), where the Court refused to accept certification of a question from the Eighth Circuit, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Therefore, this petition does not present the types of questions which should motivate this Court to include this case among the relatively small proportion of cases which it chooses to review by writ of certiorari.

It may also be doubted whether this Court is in a position to improve upon the analysis of these issues undertaken by the court of appeals. In the first place, that court is undoubtedly in a better position to discern the meaning of its own prior mandate than is a reviewing court which possesses far less familiarity with the particular practices of the court which issued the mandate. Secondly, the conclusion reached by the court of appeals on this issue was unquestionably correct.

The court below decided that respondents' motions for new trial and judgment n.o.v. had not been heard on the merits on the first appeal and remanded with a specific direction to hear those motions. The reasoning of that court is stated in its opinion. (App. A to Petition)

Respondents do not wish to burden this Court with a restatement of all of the arguments on the issue which were presented to the court of appeals. However, the most important consideration supporting the court's decision which was not explicitly discussed in its opinion is worth brief mention, inasmuch as it conclusively demonstrates the correctness of the court's decision. That consideration is the simple fact that it is impossible to conceive any plausible explanation of the court's modification of its opinion on the first appeal other than the conclusion that the court was explicitly directing the district court to consider respondents' motions on their merits. The original opinion of the court had simply directed the district court to enter judgment for petitioner (R. 296). In response to respondents' petition for rehearing, the court deleted that direction and substituted a direction to conduct "further proceedings" (R. 289). The only "further proceedings" of any sort which had been mentioned or suggested in respondents' petition were the hearing and decision of respondents' motions for a new trial and for judgment n.o.v. (R. 391-411). If, therefore, the court had not intended that the district court should entertain these motions, there would have been no reason whatsoever for it to have altered its original direction that judgment should be entered for petitioner.

Thus, the only serious issue which is legitimately presented by this Petition for a Writ of Certiorari is of no general significance whatsoever and in any event has been resolved by the court of appeals in a manner which is unquestionably correct. Accordingly, it is submitted that the issue does not merit this Court's attention.

IV.

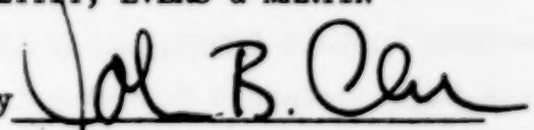
CONCLUSION

Petitioner correctly observes that this litigation is "now in its eleventh year" and pleads that it now "should be terminated." If petitioner is sincere in his desire to terminate the litigation - a desire which is wholeheartedly shared by respondents - he has chosen a singularly inappropriate method of attempting to achieve that objective. The most expeditious way to advance the conclusion of this litigation is not to commence yet another lengthy appellate proceeding in this Court, but rather to allow this case to be returned to the trial judge, who stands ready to exercise his responsibility to adjudicate the legal sufficiency of petitioner's antitrust claims. Many years ago that same trial judge, who heard all of petitioner's evidence, expressed the view that this was "a very thin case to go to the jury" and that the verdict of the jury on liability" might have to be set

aside . . . if a jury verdict is found for the plaintiff and the proper motions are made "(R. 1007). The "proper motions" have now been made and the court of appeals has specifically directed the district court to hear them. Petitioner's attempt to sidetrack the proceedings at this critical juncture by seeking from this Court some sort of advisory pronouncement which would once again delay his day of reckoning should not be countenanced. It has here been demonstrated that most of the issues presented in the Petition for Writ of Certiorari may not appropriately be considered by this Court at this time, and that the remaining issues are of insufficient importance to merit the court's attention. The petition should therefore be denied.

Dated: July 30, 1976

Respectfully submitted,
PETTIT, EVERS & MARTIN

By 

Attorneys for Respondents

APPENDIX

APPENDIX

APPENDIX 1

STATUTES INVOLVED

28 U.S.C. §2106

Section 2106 of the Judicial Code provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 50, Fed. R. Civ. P.

Rule 50 of the Federal Rules of Civil Procedure provides as follows:

> "Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.
>
> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for

> directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> (c) Same: Conditional Rulings on Grant of Motion.
>
> (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any,

by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

Rule 59, Fed. R. Civ. P.

Rule 59 of the Federal Rules of Civil Procedure provides as follows:

"Rule 59. New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the

court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion To Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-3

KERRY M. GOUGH, Trustee in Bankruptcy of Louis Rosen,
dba Walnut Creek Furniture,
Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET
AND DRAPERY CO.,
Respondents.

PETITIONER'S REPLY MEMORANDUM

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Table of Authorities Cited

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PETITIONER'S REPLY MEMORANDUM

In its brief in opposition, respondents assert (1) that issues raised in the petition are not ripe for review because all that is required is for the district court to hold hearings on the respondents' motions for new trial or judgment *n.o.v.*, (2) that the Court of Appeals could remand properly to the District Court a motion for judgment *n.o.v.* when such a motion is raised for the first time in a Petition for Rehearing to the Court of Appeals, and (3) that the Court of Appeals' decision in *Gough I* (App. B to Petition) did not include a ruling on the respondents'

Motion for New Trial or Judgment *n.o.v.* presented in their Petition for Rehearing. None of these suggestions has merit.

1. Respondents' argument that the action is not ripe for review, ignores this Court's direction to the Court of Appeals in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) to decide motions, properly presented, in a Petition for Rehearing and involving questions of law as to which the Court of Appeals is as well prepared as the trial court to rule upon, or to remand, if necessary, to the trial court with specific directions to hold hearings. It ignores the complete record before the Court of Appeals in *Gough I* and the court's opinion. The trial court acknowledged the issues raised by respondents in their motion were questions whose final determination is regularly made by the Court of Appeals (Cr. 611-612). Under *Neely*, this action should be concluded by this Court.

2. Respondents' argument as to the propriety of the remand for consideration of their motion for judgment *n.o.v.* is no more persuasive. Respondents' arguments as to their motion for judgment *n.o.v.* fail to consider the principle set forth in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947) and *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), repeated in *Neely*, that strict compliance with the provisions of Rule 50(b) is a prerequisite to entry of judgment *n.o.v.* Respondents were not precluded from making a motion for judgment *n.o.v.* in the trial court following the entry of judgment on the jury's answers to special interrogatories. Rule 50 (b) permits *any party* who has moved for a directed verdict to move to have the verdict and any judgment

thereon set aside in accordance with his motion for directed verdict. There are no limitations on respondents' ability to have moved for judgment *n.o.v.* as to the contrary verdict and judgment entered upon the jury's answers to special interrogatories number 1, 2, 4 and 5 which found violation, impact and damages under the antitrust laws.

Without such a motion in the trial court, respondents were limited under Rule 50(d) to setting forth grounds on appeal as to why a new trial should be granted if their judgment was reversed. Strict compliance with Rule 50(b) eliminates needless successive appeals, presents the issue to the trial judge, and still recognizes the right of an appellee to seek a new trial if his verdict is set aside on appeal.

3. Finally, this Court should not seriously entertain respondents' contention that this Court not determine whether the opinion in *Gough I* included a determination on the merits of respondents' motions contained in their Petition for Rehearing but rather the two motions should be returned to the trial court for its initial consideration and further appeals. This Court, of course, has the power to interpret the mandate in *Gough I* notwithstanding the Court of Appeals' interpretation and direction to the trial court in *Gough II*. *Federal Communications Com'n. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Expeditious resolution of all issues in an action will be advanced by this Court's application of *Neely* to the opinion in *Gough I* to hold the respondents' motions, if properly presented, were determined on the merits. This issue has broad application to avoid delay by appellees in presenting

issues and requiring prompt resolution in the Court of Appeals.

Justice requires that installment appeals and arguments be foreclosed and this litigation brought to its proper end. The Petition should be granted.

Dated, August 9, 1976.

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MERCANT & O'BRIEN,
By PHILIP S. KEITH,
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